Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

FIREMAN'S FUND INSURANCE COMPANY,

Petitioner,

v.

TARKINGTON, O'CONNOR & O'NEILL,

Respondent.

On Petition For A Writ Of Certiorari To The Court Of Appeal Of California, First Appellate District, Division Five

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the court below erred in affirming the jury's liability determination on the ground that the First Amendment's requirement of independent appellate review in defamation cases is limited to the issue of actual malice and does not extend to the issue of "substantial truth" or falsity.

LIST OF PARTIES

All of the parties to the proceedings in the court below are included in the caption on the cover page of this petition.

RULE 29.6 STATEMENT

Petitioner's ultimate parent company is Allianz Aktiengesellschaft. Petitioner has no non-wholly owned subsidiaries.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Fireman's Fund Insurance Company respectfully petitions this Court for a writ of certiorari to review the judgment of the Court of Appeal of California, First Appellate District, Division Five, in this case.

OPINIONS BELOW

The opinion of the court of appeal (App., *infra*, 1a-53a) is not reported. The order of the Supreme Court of California denying Fireman's Fund's petition for review (App., *infra*, 59a) and the order and judgment of the trial court (App., *infra*, 54a-58a) are not reported.

JURISDICTION

The judgment of the court of appeal was entered on June 17, 1998. Petitioner filed a timely petition for review in the Supreme Court of California, which was denied on September 30, 1998. App., *infra*, 59a. On December 23, 1998, Justice O'Connor extended the time for filing a petition for a writ of certiorari to and including January 28, 1999. *See* Application No. A-498. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISION INVOLVED

The First Amendment to the Constitution of the United States provides, in pertinent part, that "Congress shall make no law . . . abridging the freedom of speech, or of the press . . . ." U.S. CONST. amend. I.

STATEMENT OF THE CASE

This case presents the important question whether the First Amendment requires independent appellate review of questions of "constitutional fact" in defamation cases, including the question whether an allegedly defamatory statement on a matter of public concern is "substantially

true" or false. That question arises with great frequency in defamation cases, and the lower courts are divided over its proper resolution. For the reasons set forth below, this Court's review is necessary to resolve that important and recurring question of First Amendment law.

A. Factual Background and Proceedings Below

1. In 1987, a consortium of insurers led by Commercial Union agreed to retain Tarkington, O'Connor & O'Neill (respondent herein) to represent their insured in numerous personal injury lawsuits. Fireman's Fund was a member of this consortium and therefore shared in the legal costs associated with the representation. As part of its representation of the insured, respondent was required to "spread bill" general work that related to multiple cases by allocating the time spent on such work to as many individual cases as was appropriate. App., *infra*, 2a.

In October 1989, Commercial Union informed respondent that a legal auditing firm had been retained to audit respondent's bills. That audit was completed in 1990, and "revealed numerous billing irregularities . . . ." App., *infra*, 3a. The insurers accordingly "sought a reduction in [respondent's] unpaid fees" and removed respondent as counsel for their insured. *Id.* Fireman's Fund and respondent ultimately submitted their dispute over the unpaid fees to binding arbitration in June 1991. *Id.* at 7a.

On August 1, 1991, *The Recorder*, a San Francisco legal newspaper, published an article discussing the audit of respondent's legal bills. The article reported the auditors' findings of numerous billing irregularities and improprieties, including "'vague descriptions of time, patterns of identical short entries billed to scores of files and a lack of back-up documentation for the billings.'" App., *infra*, 4a. The article also disclosed the auditors' findings that partners had "added time onto draft bills without preparing time sheets"; some $53,000 worth of time was billed by one of respondent's name partners who "did not do substantial work on the . . . litigation"; and another name part-

ner's time entries "did not correlate with the kind of work that he did" and "appeared to duplicate time sheets of a law clerk." *Id.* It is undisputed that the audit contained all of these findings. *Id.*

In addition, the article stated that when the time recorded by individual timekeepers was audited, "'some totals were mathematically impossible.'" App., *infra*, 4a. The article cited an instance in which, according to a representative of Fireman's Fund, one of respondent's name partners "'billed 33 hours one day.'" *Id.* The article noted respondent's claim that this was merely a "'data-inputting mistake[].'" *Id.* The article also referred to an instance "[w]here one timekeeper had billed 785 hours in a month—well above the 720 hours in a 30-day month." *Id.* The article identified no source for that allegedly defamatory statement, which constitutes the basis for this lawsuit.

In July 1992, the *Wall Street Journal* published an article about law firm overbilling that contained a brief discussion of respondent's billing irregularities. The article stated that "'[a] Fireman's Fund audit of [respondent] established that one senior partner at the San Francisco firm billed 33 hours in a single day, and another lawyer supposedly toiled 785 hours in a month (a 31-day month has only 744 hours) while working on an asbestos-related case.'" App., *infra*, 6a.

In March 1993, the arbitrator issued his decision in the overbilling dispute. App., *infra*, 61a-70a. He expressly found that "[respondent's] time keeping and task description . . . resulted in exaggerated unjustifiable time being billed," that "the use to which spread billing was put resulted in substantial over statement of the time expended in performing many tasks, and that little care was taken to curb such a tendency." App., *infra*, 67a. He further found that "over the years invoices were submitted for payment by the insurers with representations of time and task and case designations which were untrue." *Id.* at 68a. He determined that "[t]here can be no doubt that, as to the billing of the senior partner's time generated by merely adapting

another employee's time sheets, the practice was *wilfully and knowingly false*." *Id.* at 68a (emphasis added). And he found that other aspects of respondent's billing practices "amounted to a deceptive deviation from the terms of the agreement with the insurers" which "fell within the proscription of" California's statutory prohibition against constructive fraud. *Id.* at 69a.

The arbitrator declined to find that respondent's conduct "was 'an *extreme* case of fraud'" that would justify disallowance of *all* of respondent's fees. App., *infra*, 68a (emphasis added). He further held, however, that the absence of "extreme" fraud provided no bar to Fireman's Fund's right to "recovery of payments *induced by misrepresentation*." *Id.* (emphasis added). Accordingly, the arbitrator reduced respondent's fees by $463,579 "for overbilling and other improprieties." *Id.* at 7a, 70a. The arbitrator's decision was confirmed by a California state court (*id.* at 60a), thereby rendering the arbitrator's findings conclusive. Cal. Civ. Proc. Code § 1287.4.

2. In March 1994, respondent filed this action in California state court, alleging *inter alia* that Fireman's Fund had defamed it by causing publication of false statements to the effect that one of respondent's timekeepers had billed 785 hours in a month. Respondent also asserted a claim for breach of fiduciary duty. App., *infra*, 6a-7a.[1]

Respondent did not (and could not) dispute the arbitrator's findings that respondent had engaged in "overbilling and other improprieties." App., *infra*, 7a. Moreover, respondent "d[id] not dispute that 33 hours of billed time appeared on one timekeeper's statement for one day's activities." *Id.* at 4a. The parties disagreed over whether this

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[1] Respondent's complaint alleged a number of other claims, including breach of contract, fraud, and an additional defamation claim based on a speech by a Fireman's Fund executive, but those claims were rejected below. App., *infra*, 8a-10a, 26a.

admitted "instance of an impossible billing day" was "the result of a clerical error," but there is no question that "33.5 hours was billed on one day." *Id.* at 5a. Fireman's Fund stipulated that "the 785 hour billing month was not found in either an audit or a review of billings." *Id.* The only evidence of a 785-hour month came from statements made by a former partner of respondent whose "recollection of the number of hours billed in that month varied over time." *Id.*[2]

The jury found in favor of respondent on the defamation and fiduciary duty claims, and awarded $3 million in damages. The trial court granted Fireman's Fund's motion for judgment notwithstanding the verdict on the fiduciary duty claim, but rejected Fireman's Fund's post-trial challenges to the defamation verdict and upheld the jury's $3 million award. App., *infra*, 8a.

3. The court of appeal affirmed the judgment of liability on the defamation claim. App., *infra*, 14a-31a. By a 2-1 vote, the court rejected Fireman's Fund's argument that the First Amendment requires de novo appellate review of the falsity determination in cases involving speech on matters of public concern. *Id.* at 14a-17a. The court began its analysis by correctly recognizing that the allegedly defamatory statements concern a public issue, and thus the First Amendment is directly implicated in this case: "[A]ttorneys' billing practices are a public issue, because they determine the price paid by the public for attorneys' services. 'Members of the public "have an interest in matters which affect their roles as consumers."'" *Id.* at

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[2] Fireman's Fund disputed respondent's allegation that Fireman's Fund was responsible for the newspaper articles' references to a 785-hour-month, and there was no direct evidence to support that allegation. The jury nonetheless found in favor of respondent on that issue, and the court of appeal affirmed. App., *infra*, 26a-29a. Fireman's Fund does not seek this Court's review of that incorrect, but fact-bound, determination.

15a (citation omitted). The court also acknowledged that the First Amendment requires plaintiffs to "bear the burden of proving falsity of the defamatory statement, as well as proving fault." *Id.* at 15a.

Nonetheless, the court of appeal held that "[b]ecause there was no issue of actual malice in this private figure case, we are not required to conduct an independent review of the entire record." App., *infra*, 15a. The court reasoned that, pursuant to binding precedent of the Supreme Court of California, independent appellate review is required "'only as it pertains to actual malice. Issues apart from this constitutional question need not be reviewed de novo and are subject to the usual rules of appellate review.'" *Id.* (quoting *McCoy v. Hearst Corp.*, 727 P.2d 711, 716 (Cal. 1986)); *see also* App., *infra*, 15a ("the California Supreme Court has indicated its belief that a de novo standard of review applies only to the issue of actual malice"). The court of appeal therefore declined to apply independent appellate review to the question of substantial truth or falsity of the allegedly defamatory statements. *Id.* at 16a.

Applying only the deferential "substantial evidence" standard of review, the court of appeal rejected Fireman's Fund's challenge to the jury's finding that the 785-hour-month allegation was not "substantially true." App., *infra*, 17a-25a. The court recognized that under California law and the First Amendment, "'[m]inor inaccuracies do not amount to falsity so long as "the substance, the gist, the sting of the libelous charge be justified."'" *Id.* at 18a (quoting *Masson v. New Yorker Magazine, Inc.*, 501 U.S. 496, 517 (1991)). Moreover, the court held that it is "reasonable" to construe the 785-hour-month statement as "imput[ing] only nonfraudulent overbilling of the type that the arbitrator determined [respondent] had committed." App., *infra*, 20a. Nonetheless, and despite the undisputed fact that respondent engaged in extensive overbilling and questionable billing practices, the court felt compelled to uphold the jury's finding of falsity because "we cannot overturn the jury's conclusion that the 785 hour billing

month statement went beyond an implication of overbilling and conveyed the false and defamatory imputation that [respondent] defrauded Fireman's Fund." *Id.* at 24a. The court explained that, in keeping with California law, it was "'not free to reweigh the evidence and set aside the jury verdict merely . . . because judges feel that other results are more reasonable.'" *Id.* (quoting *Maheu v. Hughes Tool Co.*, 569 F.2d 459, 467 (9th Cir. 1978)).

The court of appeal rejected Fireman's Fund's other challenges to the defamation verdict, and accordingly affirmed the judgment of liability on that claim. App., *infra*, 26a-31a, 34a. The court also upheld the trial court's grant of judgment notwithstanding the verdict on the fiduciary duty claim. App., *infra*, 11a-14a. Because the jury's award of damages failed to differentiate between damages associated with the defamation claim and the overturned fiduciary duty claim, however, the court of appeal remanded the case for a new trial on the issue of damages only. *Id.* at 31a-32a, 34a. The court affirmed the judgment in all other respects. *Id.* at 34a.

Presiding Justice Peterson dissented from the majority's ruling on the defamation claim. App., *infra*, 35a-53a. He concluded that the First Amendment requires independent appellate review of the "substantial truth" issue, explaining that independent review "is not dependent on the presence of an actual malice issue, as the majority posits. To the contrary, that review is mandatory simply because constitutional free speech guarantees preclude defamation liability for utterances or publications comprising the substance, gist or sting of a truthful statement." *Id.* at 36a.

Applying the requisite independent review to the undisputed historical facts in the case, Justice Peterson concluded that the "gist" or "sting" of the 785-hour-month statement was "substantially true" and therefore nondefamatory. He explained that "'[t]he 'average reader' of the publication in question here would understand it as an accusation that [respondent] overbilled for its services. That accusation was shown by indisputable evidence to be

substantially true . . . ." *Id.* at 49a. "[W]here the gist or sting is overbilling, and where that accusation is true, an inaccuracy as to the time period overbilled for is not a substantial enough deviation from the truth so as to change the sting of the accusation . . . ." *Id.* at 49a.

Fireman's Fund filed a petition for review in the Supreme Court of California. Over the dissent of two justices, that court denied review. App., *infra*, 59a.

B. How The Federal Question Was Presented

Fireman's Fund expressly relied on the First Amendment and on this Court's precedents in the trial court. For example, Fireman's Fund cited *Masson v. New Yorker Magazine, Inc.*, 501 U.S. 496 (1991), for the proposition that a defamation plaintiff "cannot meet [its] burden of proving falsity if the statement is substantially true, in that its gist or sting is accurate." C.T. 03980.[3] Likewise, Fireman's Fund cited *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767, 777 (1986), for the proposition that "[p]ursuant to the free speech protections provided by the United States . . . constitution[], a private figure plaintiff bears the burden of proving the falsity of an allegedly defamatory statement when the speech complained of involves a matter of public concern." C.T. 04049. And Fireman's Fund argued that respondent could not satisfy that constitutionally mandated burden because "the 'substance' or 'gist' of the '785 hour' statement is that the Firm overbilled," and "the Arbitrator's Decision confirms that [respondent] overbilled as a matter of law." C.T. 04088.

In the court of appeal, Fireman's Fund again relied on the First Amendment, and argued that the court was required to conduct an independent appellate review of the

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[3] "C.T." refers to the "clerk's transcript" of pleadings and other documents filed in the trial court and made part of the record on appeal. *See* CAL. R. CT. 4.5 and 5.

question of substantial truth or falsity. Pet. Ct. App. Br. at 14-16. In particular, Fireman's Fund argued that "[b]ecause this case involves First Amendment issues, 'an appellate court has an obligation to "make an independent examination of the whole record" in order to make sure that "the judgment does not constitute a forbidden intrustion on the field of free expression."'" *Id.* at 15 (quoting *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 499 (1984)). Fireman's Fund specifically noted the trial court's denial of Fireman's Fund's motions seeking judgment based on "[respondent's] failure to prove that the 'gist' of the alleged defamation was false," and asserted that "[g]iven the First Amendment concerns at issue in this case, the trial court's denial of each of these motions should be subjected to this Court's independent review." *Id.* at 16. The court of appeal squarely addressed and rejected this argument. App., *infra*, 14a-17a.

Fireman's Fund also raised its First Amendment argument in the Supreme Court of California. Fireman's Fund asked that court to determine the "scope of review in a defamation case involving speech addressing a matter of public concern," and argued that "[g]iven the First Amendment rights at issue, this verdict should have been scrutinized on appeal to ensure that constitutional free speech protections were properly applied." Pet. for Rev. at 1 (citing *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 499 (1984)); *see also, e.g.*, Pet. for Rev. at 21 ("[T]he [court of appeal] erred in holding that 'falsity' need not be independently reviewed. Only through independent review may an appellate court ensure that First Amendment principles are constitutionally applied.").

REASONS FOR GRANTING THE WRIT

As evidenced by the decision below, the California courts continue to shirk their constitutional obligation to conduct independent appellate review of issues of "constitutional fact" in defamation cases, and instead limit the scope of such review to the issue of "actual malice."

That unduly narrow reading of the First Amendment's requirement of independent review strikes at the heart of the protections crafted by this Court in *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), and *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485 (1984). For the reasons set forth below, the California courts' interpretation of the First Amendment is inconsistent with this Court's precedents, exacerbates a widening conflict among the lower state and federal courts, and unduly chills freedom of expression on matters of public concern. This Court's immediate review is therefore warranted.

I. The Decision Below Is Inconsistent With This Court's Precedents Mandating Independent Appellate Review In First Amendment Cases

The court of appeal squarely held that the First Amendment's requirement of independent appellate review applies only to the issue of "actual malice," and does not extend to the factfinder's resolution of the question of "substantial truth" or falsity. App., *infra*, 14a-17a. The court based that holding directly on the California Supreme Court's prior decision in *McCoy v. Hearst Corp.*, 727 P.2d 711 (Cal. 1986), which announced the rule that independent appellate review is required "only as it pertains to actual malice. Issues apart from this constitutional question need not be reviewed de novo and are subject to the usual rules of appellate review." *Id.* at 716; App., *infra*, 15a. *Accord McCoy v. Hearst Corp.*, 278 Cal. Rptr. 596, 601 (Cal. Ct. App. 1991) ("on the issue of actual malice, *as opposed to other factual issues in the case*, the courts are required to independently examine the record to determine whether it provides clear and convincing proof thereof") (emphasis added). Thus, it is clear that the California courts have adopted a rule limiting the First Amendment requirement of de novo appellate review to the question of "actual malice," while refusing to conduct such review of other factual questions in defamation cases—including the issue of "substantial truth" or falsity.

The fact that this rule has been announced in published opinions of the California appellate courts demonstrates that the unpublished nature of the opinion below does not militate against a grant of certiorari in this case. California's narrow reading of the First Amendment's independent-review requirement is now embedded in the law of that State, and thus is no longer deemed sufficiently noteworthy to justify issuance of a published opinion. Absent review by this Court in this case, therefore, the California courts' erroneous standard will continue to govern all defamation cases arising in the Nation's most populous State, even though, as demonstrated in this petition, that standard cannot be reconciled with this Court's precedents and conflicts with decisions from other States.

The rule adopted by the California courts and adhered to in the decision below is inconsistent with this Court's cases establishing the independent-review requirement. While this Court has not previously considered the precise question presented here, the applicable precedents compel the conclusion that the independent review requirement is not limited to the issue of "actual malice," but instead extends to all questions of "constitutional" fact—a category that plainly includes the question of "substantial truth" or falsity in cases like this one involving allegedly defamatory statements regarding matters of public concern.

A. The Requirement of Independent Review Applies to all Questions of "Constitutional Fact" in Defamation Cases

In *New York Times Co. v. Sullivan*, this Court adopted the "actual malice" standard for public-figure defamation cases, and made clear that independent appellate review of the record is required in defamation cases "to assure . . . [that] a forbidden intrusion on the field of free expression" has not occurred. 376 U.S. at 285. The Court's rationale for requiring independent appellate review in such cases was not in any way dependent on or limited to the issue of "actual malice." Instead, the Court expressed a consid-

erably broader rationale, describing the independent review requirement as one arising from the Court's duty "in proper cases . . . to make certain that [constitutional] principles have been constitutionally applied." *Id.* The case before it was "such a case," in the Court's view, "since the question is one of alleged trespass across 'the line between speech unconditionally guaranteed and speech which may legitimately be regulated.'" *Id.* "*In cases where that line must be drawn*," the Court explained, "the rule is that we 'examine for ourselves the statements in issue and the circumstances under which they were made to see . . . whether they are of a character which the principles of the First Amendment . . . protect." *Id.* (emphasis added). Thus, *New York Times* stands for the proposition that the requirement of independent review applies "[i]n cases where that line" between "speech unconditionally guaranteed and speech which may legitimately be regulated" must be drawn—a category that is not limited to the question of actual malice and that includes the full range of defamation cases implicating First Amendment concerns.

The Court reaffirmed the independent-review requirement in *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485 (1984). The *Bose* Court characterized that requirement as one that arises "*in cases raising First Amendment issues*," noting that in such cases "we have repeatedly held that an appellate court has an obligation to 'make an independent examination of the whole record' in order to make sure that 'the judgment does not constitute a forbidden intrusion on the field of free expression.'" *Id.* at 499 (emphasis added, citation omitted). Moreover, the *Bose* Court listed several narrow categories of speech that fall outside the scope of First Amendment protection (including "[l]ibelous speech"), and made clear that the obligation of independent review is triggered *whenever* the claim is made that particular speech falls into one of those unprotected categories. *Id.* at 504. The Court explained that "*[i]n each of these areas* . . . the unprotected character of particular communications[] ha[s] been determined by the *judicial evaluation of special facts* that have been

deemed to have constitutional significance." *Id.* at 504-05 (emphasis added). Thus, "[i]*n such cases*, the Court has regularly conducted an independent review of the record both to be sure that the speech in question actually falls within the unprotected category and to confine the perimeters of any unprotected category within acceptably narrow limits in an effort to ensure that protected expression will not be inhibited." *Id.* at 505 (emphasis added).

Accordingly, *Bose* reaffirms and underscores the unmistakable message of the *New York Times* decision: The rationale for the independent-review requirement is not dependent on or uniquely linked to the "actual malice" standard, but instead rests upon the fundamental obligation of courts to guard zealously the boundary between protected and unprotected speech by exercising exacting judicial scrutiny of those "special facts that have been deemed to have constitutional significance." 466 U.S. at 505. This heightened judicial scrutiny is essential to the survival of the free speech guarantee, because "[p]roviding triers of fact with a general description of the type of communication whose content is unworthy of protection has not, in and of itself, served sufficiently to narrow the category, nor served to eliminate the danger that decisions by triers of fact may inhibit the expression of protected ideas." *Id.* In short, the First Amendment "imposes a special responsibility on judges *whenever* it is claimed that a particular communication is unprotected." *Id.* at 505 (emphasis added); *see also Hurley v. Irish-American Gay, Lesbian, and Bisexual Group of Boston*, 515 U.S. 557, 567 (1995) ("This obligation [of independent review] rests upon us simply because the reaches of the First Amendment are ultimately defined by the facts it is held to embrace, and *we must thus decide for ourselves whether a given course of conduct falls on the near or far side of the line of constitutional protection.*") (emphasis added); *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 915 & n.50 (1982).

The foregoing precedents make clear that the First Amendment requires independent appellate review *when-*

ever a plaintiff seeks to pierce the presumptively applicable protections of the First Amendment. In particular, these cases stand for the proposition that the independent-review requirement extends to all "facts that have been deemed to have constitutional significance" in First Amendment cases. *Bose*, 466 U.S. at 505. "The simple fact is that First Amendment questions of 'constitutional fact' compel this Court's *de novo* review." *Id.* at 508 n.27.

Not every factual issue presented in a defamation case is subject to the independent review requirement, of course, because not every disputed fact is of "constitutional significance." Mere credibility determinations, for example, are not reviewed de novo (*see id.* at 511-14); "[t]here are . . . many findings of fact in a defamation case that are *irrelevant to the constitutional standard* . . . and to which the clearly-erroneous standard of Rule 52(a) is fully applicable." *Id.* at 515 n.31 (emphasis added). But with respect to those factual questions that are of constitutional significance, independent appellate review is required.

B. The Truth/Falsity Inquiry is of "Constitutional Significance" in Defamation Cases Involving Speech on Matters of Public Concern, and is Therefore Subject to Independent Review

The foregoing discussion compels the conclusion that the First Amendment requires independent appellate review of the determination whether an allegedly defamatory statement on a subject of public concern was "substantially true." Far from being "irrelevant to the constitutional standard" in such cases, the issue of substantial truth or falsity is an integral part of the "constitutional standard." Indeed, the rule that speech is constitutionally immune if its "gist" or "sting" is substantially true marks the line between "speech unconditionally guaranteed and speech which may legitimately be regulated" just as much as the requirement of proving actual malice.

This Court has repeatedly held that the question of falsity is one of constitutional dimension when the challenged

speech addresses a matter of public concern. In cases involving public-figure plaintiffs and speech on matters of public concern, the plaintiff "must show the falsity of the statements at issue in order to prevail in a suit for defamation." *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767, 775 (1986); *see, e.g., Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 19 (1990) ("a statement . . . must be provable as false before there can be liability under state defamation law"); *Herbert v. Lando*, 441 U.S. 153, 176 (1979) ("the plaintiff must . . . prove a false publication attended by some degree of culpability"); *Garrison v. Louisiana*, 379 U.S. 64, 74 (1964) ("a public official [is] allowed the civil remedy [of defamation damages] only if he establishes that the utterance was false").

The constitutional requirement of falsity is not satisfied if the challenged statement, while technically inaccurate, is "substantially true." In *Masson v. New Yorker Magazine, Inc.*, 501 U.S. 496 (1991), for example, the Court noted that First Amendment principles required placing "the burden . . . upon [the plaintiff] to prove falsity" in that case. *Id.* at 517. The Court then elaborated on the nature of the constitutionally compelled falsity inquiry, and held that the requisite showing of falsity could not be made if the allegedly defamatory statement was substantially true: "Minor inaccuracies do not amount to falsity so long as 'the substance, the gist, the sting, of the libelous charge be justified.' Put another way, the statement is not considered false unless it 'would have a different effect on the mind of the reader from that which the pleaded truth would have produced.'" *Id.* (citations omitted).

Although some of the foregoing cases involved public figure plaintiffs, and thus were governed by the *New York Times* "actual malice" standard, the Court has squarely held that the constitutional dimensions of the truth/falsity inquiry extend to cases involving private-figure plaintiffs who claim to have been defamed by speech on matters of public concern. In *Philadelphia Newspapers, Inc. v. Hepps*, the Court stated that "[w]hen the speech is of pub-

lic concern but the plaintiff is a private figure, . . . the Constitution still supplants the standards of the common law . . . ." 475 U.S. at 775. Thus, the Court held that "the common law's rule on falsity . . . must . . . fall here to a constitutional requirement that the plaintiff bear the burden of showing falsity, as well as fault, before recovering damages." *Id.* at 776.[4] The Court recognized that shifting the common-law burden of proof would insulate some false statements from liability, but concluded that doing so was necessary to provide "breathing space" to constitutionally protected speech. *Id.* at 776-78.

As both courts below held, the allegedly defamatory speech at issue in this case—which concerns the important matter of substantial overbilling for legal services—plainly involves a matter of public interest and concern. App., *infra*, 15a. Accordingly, this Court's precedents conclusively establish that the question of "substantial truth" or falsity is one of "constitutional significance." And under *New York Times* and *Bose*, it is beyond dispute that the First Amendment's requirement of independent appellate review is directly applicable to such questions.

As noted above, the court of appeal rested its contrary conclusion on binding California case law limiting the in-

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[4] Although *Hepps* involved a media defendant (*see* 475 U.S. at 779 n.4; *Milkovich*, 497 U.S. at 20 n.6), courts routinely apply the same standard in cases involving non-media defendants. *See, e.g., Burroughs v. FFP Operating Partners, L.P.*, 28 F.3d 543, 549-50 (5th Cir. 1994); *In re IBP Confid. Bus. Docs. Litig.*, 797 F.2d 632, 642 (8th Cir. 1986); *Nizam-Aldine v. City of Oakland*, 54 Cal. Rptr. 2d 781, 787 (Ct. App. 1996); *Ayala v. Washington*, 679 A.2d 1057, 1063 n.2 (D.C. 1996); *Wheeler v. Nebraska St. Bar Ass'n*, 508 N.W.2d 917, 921 (Neb. 1993); *Dodson v. Dicker*, 812 S.W.2d 97, 98-99 (Ark. 1991); *Caruso v. Local Union No. 690*, 730 P.2d 1299, 1302 (Wash. 1987). A small minority of jurisdictions have reached the opposite conclusion, however. *See, e.g., Kanaga v. Gannett Co.*, 687 A.2d 173, 181-82 (Del. 1996). This case provides an opportunity to resolve that conflict.

dependent-review requirement to the issue of actual malice. California's rule in that regard is patently incorrect, however, as the foregoing discussion amply demonstrates. Indeed, this Court has independently reviewed a wide array of "constitutional facts" in the First Amendment context, including issues other than actual malice in defamation cases. In *New York Times v. Sullivan*, for example, the Court applied independent review to the question whether the statements were "of and concerning" the plaintiff. 376 U.S. at 288 ("We also think the evidence was constitutionally defective in another respect [than the absence of actual malice]: it was incapable of supporting the jury's finding that the allegedly libelous statements were made 'of and concerning' respondent."). Similarly, the *Bose* Court cited as another example of independent review the decision in *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 277 (1971), which "held 'as a matter of constitutional law' that the jury could not be allowed to determine the relevance of a defamatory statement to the plaintiff's status as a public figure." 466 U.S. at 509.

In *Milkovich v. Lorain Journal Co.*, moreover, the Court established that the requirement of de novo appellate review is fully applicable to the "constitutional facts" at issue in private-figure, public-concern cases. The *Milkovich* Court observed that where an allegedly defamatory statement "involves a private figure on a matter of public concern, a plaintiff must show that the false connotations were made with some level of fault as required by *Gertz* [*v. Robert Welch, Inc.*, 418 U.S. 323 (1974)]." 497 U.S. at 20-21. The Court then emphasized the necessity of independent appellate review in such cases: "[T]he enhanced appellate review required by *Bose Corp.* provides assurance that the foregoing determinations will be made in a manner so as not to 'constitute a forbidden intrusion of the field of free expression.'" *Id.* at 21.

The import of this Court's precedents is thus unmistakable: The First Amendment requires de novo appellate review of "constitutional facts" in defamation cases, *in-*

cluding the question of "substantial truth" or falsity. The decision below, and the established rule in California, are squarely to the contrary. This Court's review is necessary to resolve the continuing conflict between California law and this Court's precedents. *See* SUP. CT. R. 10(c).

II. The Decision Below Exacerbates An Existing Conflict Among The Lower State And Federal Appellate Courts Regarding The Scope Of The Independent Appellate Review Requirement

California's prohibition of independent review in defamation cases except with respect to the issue of "actual malice" is inconsistent with the decisions of several other state appellate courts. In *Locricchio v. Evening News Ass'n*, 476 N.W.2d 112 (Mich. 1991), for example, the Supreme Court of Michigan carefully reviewed First Amendment precedents and policy considerations and determined that "an independent appellate review of the burden of proof with regard to falsity in private-figure, public-interest cases deters 'forbidden intrusion on the field of free expression' as a logical corollary to independent review of actual malice." *Id.* at 124-25 (citation omitted). Accordingly, the *Locricchio* court held that "[t]he [First Amendment] principle of independent review logically extends to determining whether a plaintiff satisfies her burden of proving falsity." *Id.* at 125. The Michigan Supreme Court reaffirmed that conclusion in *Rouch v. Enquirer & News of Battle Creek Michigan*, 487 N.W.2d 205, 211-14 (Mich. 1992), expressly adhering to its view that, in accordance with the dictates of the First Amendment, "[w]e . . . independently review the whole record . . . to consider whether material falsity was shown." *Id.* at 214.

Similarly, in *Deaver v. Hinel*, 391 N.W.2d 128, 131-32 (Neb. 1986), the Supreme Court of Nebraska applied "heightened judicial scrutiny on appeal" and concluded that "[plaintiff] has not met the threshold burden of proving that the statements published in the Tribune were false." Although the plaintiff in *Deaver* was a public fig-

ure, the court found no need to reach the question of "actual malice," because its independent review of the record demonstrated that the plaintiff's "evidence fail[s] to establish with convincing clarity that the published statements were false." *Id.* at 132-33.

Likewise, in *Lyons v. Rhode Island Public Employees Council 94*, 559 A.2d 130 (R.I. 1989), the Supreme Court of Rhode Island applied independent review to the question of falsity. The court read *Bose* to impose a "duty of independently reviewing the entire record," and accordingly held that "[i]n order for us to uphold the verdict, the record must *independently* support the assertion that the alleged defamatory material contains a false and defamatory statement of fact." *Id.* at 135 (emphasis added). Based on its independent review, the court found that the allegedly defamatory statements were not actionable: "[W]e find that the jury is prevented from concluding that the article was false and defamatory. Therefore, we find that the [challenged] reprints did not contain a false and defamatory statement of fact." *Id.*[5] *See also Brown & Williamson Tobacco Corp. v. Jacobson*, 827 F.2d 1119, 1129 (7th Cir. 1987) (noting confusion over whether independent review applies to falsity issue, and "accepting, for purposes of this case only, . . . that *Bose* mandates a wide-ranging appellate review, with little or no deference to the jury's findings, of all aspects of this case including falsity"); *Levine v. CMP Publications, Inc.*, 738 F.2d 660, 685 (5th Cir. 1984) (Tate, J., dissenting) (arguing that in a private-figure defamation case, *Bose* requires appellate courts to "independently determine, after affording weight

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[5] *Lyons* involved a public figure plaintiff, and the court separately addressed the question of actual malice. 559 A.2d at 136. The significance of *Lyons*, however, is that the court independently reviewed the issue of falsity, in direct contrast to the approach followed by the California courts.

to all credibility determinations by the trier of fact, whether the present expression . . . was false").[6]

Other appellate courts, by contrast, have adopted the same approach followed by the California courts, holding that the requirement of independent appellate review does not apply to the question of substantial truth or falsity. In *Lundell Mfg. Co. v. American Broadcasting Cos.*, 98 F.3d 351 (8th Cir. 1996), *cert. denied*, 117 S. Ct. 1470 (1997), for example, the Eighth Circuit rejected independent review of falsity in private-figure defamation cases. In that case, the private-figure plaintiff argued that the court of appeals should review the jury's finding of falsity under the sufficiency-of-the-evidence standard, while the defendant contended that the First Amendment required independent appellate review. *Id.* at 356. Rejecting the defendant's argument, the Eighth Circuit held that "the First Amendment commands in a defamation case brought by a private plaintiff against a media defendant only that we review the record to determine whether a reasonable trier of fact could find that the statement could be interpreted as a false assertion of fact. In essence, [Supreme Court case

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[6] The Seventh Circuit's opinion in *Haynes v. Alfred A. Knopf, Inc.*, 8 F.3d 1222 (7th Cir. 1993), is less than clear on this issue. Relying on *Bose*, the court stated that "[t]o any suggestion that the outer bounds of liability should be left to a jury to decide we reply that in cases involving the rights protected by the speech and press clauses of the First Amendment the courts insist on firm judicial control of the jury." *Id.* at 1234. In addressing the issue of substantial truth directly, however, the court stated that "[o]rdinarily the question whether a defamatory work is substantially true although erroneous in some details is for the jury. But no reasonable jury, even if it believed [the plaintiffs] on every issue . . ., could find that [defendant's book] was not substantially true in its depiction of [plaintiffs]." *Id.* at 1228. Thus, it is not entirely clear whether the court applied independent review, in keeping with *Bose*, or instead applied a more deferential standard.

law] support[s] a *sufficiency of the evidence* analysis." *Id.* at 359 (emphasis added).[7]

A number of other appellate decisions are to the same effect. *See, e.g., Levine*, 738 F.2d at 672 n.19 ("[W]e are convinced that the more rigorous standard of review mandated by *Bose* . . . for awards of actual damages in defamation suits brought by public-figure plaintiffs, is inappropriate here" in a private-figure-plaintiff case);[8] *Maheu v. Hughes Tool Co.*, 569 F.2d 459, 464-65 (9th Cir. 1977) (rejecting de novo review of falsity determination, and opining that "it is questionable whether the issue of truth rises to the level of a 'constitutional fact'"); *Peeler v. Spartan Radiocasting, Inc.*, 478 S.E.2d 282, 284 (S.C. 1996) ("We agree our scope of review on the issue of actual malice is a *de novo* review to determine if there is clear and convincing evidence. However, we do not agree

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[7] The *Lundell* court did state that "[w]ithin the context of deciding whether there is substantial evidence to support the jury's finding of falsity, we must also discern whether there has been any intrusion on the protections of the First Amendment. Thus, if no reasonable jury could conclude that the statement was a false statement of material fact, the libel defendant is protected from a defamation suit." 98 F.3d at 359. But the court concluded that "[t]he question of whether there has been any intrusion on First Amendment principles is seemingly subsumed in the inquiry as to whether there is substantial evidence to support the jury's findings as to falsity and substantial truth." *Id.* In other words, the only "independent review" required for falsity in private-figure defamation cases, according to the Eighth Circuit, is nothing more than the traditional clearly erroneous standard for routine factfinding under Fed. R. Civ. P. 52(a).

[8] The Fifth Circuit has subsequently reaffirmed *Levine*'s rejection of independent review. *See Brown v. Petrolite Corp.*, 965 F.2d 38, 43 (5th Cir. 1992) ("[T]he jury found that the statements . . . were false and defamatory. We must affirm this verdict if substantial evidence supports the jury's conclusion.") (citing *Levine*, 738 F.2d at 671).

this is the proper scope of review on the issue of falsity."), *cert. denied*, 117 S. Ct. 2455 (1997); *see also Schiavone Constr. Co. v. Time, Inc.*, 847 F.2d 1069, 1081, 1084 (3d Cir. 1988) (reviewing falsity issue under deferential standard without expressly discussing obligation of independent review); *Zerangue v. TSP Newspapers, Inc.*, 814 F.2d 1066, 1073-74 (5th Cir. 1987) (same); *Gannett Co. v. Re*, 496 A.2d 553, 557-58 (Del. 1985) (same).

California's rejection of independent review for questions other than "actual malice" is also inconsistent with a number of decisions involving other "constitutional facts" in defamation cases. Thus, for example, a number of decisions have applied the *Bose* independent-review standard to the questions whether the allegedly defamatory statements had a defamatory meaning, were "of and concerning" the plaintiff, or (in cases involving private-figure plaintiffs) were made with the requisite negligence. *See Miami Herald Publ'g Co. v. Ane*, 458 So.2d 239, 242 (Fla. 1984) (applying independent review to issues of negligence and defamatory meaning); *Dodson v. Dicker*, 812 S.W.2d 97, 98-99 (Ark. 1991) (defamatory meaning); *Dixon v. Ogden Newspapers, Inc.*, 416 S.E.2d 237, 241 (W. Va. 1992) (same); *Deaver v. Hinel*, 391 N.W.2d at 133-34 (applying independent review in determining whether allegedly defamatory speech was "of and concerning" the plaintiff). Other jurisdictions, by contrast, follow California's approach and apply only deferential appellate review to these issues. *See, e.g., Brown v. Petrolite Corp.*, 965 F.2d 38, 45 (5th Cir. 1992) (applying deferential "substantial evidence" standard to jury's negligence finding); *Draghetti v. Chmielewski*, 626 N.E.2d 862, 868 n.10 (Mass. 1994) ("Because the 'actual malice' standard is inapplicable [in this private-figure-plaintiff case], so too is the *Bose* independent review doctrine."); *Michigan Microtech, Inc. v. Federated Publications, Inc.*, 466 N.W.2d 717, 722 (Mich. Ct. App. 1991) (reviewing negligence determination under deferential standard); *Lansdowne v. Beacon Journal Publ'g Co.*, 512 N.E.2d 979, 985 (Ohio 1987) ("in cases such as the one at bar, where actual malice need not

be proven, we decline to embrace the independent review requirement"); *Gazette, Inc. v. Harris*, 325 S.E.2d 713, 727-28 (Va. 1985) (rejecting independent appellate review of negligence and all other issues except "actual malice").

Commentators have noted the division and confusion among federal and state courts on the question whether *Bose*'s independent review standard applies to findings of falsity. *See, e.g.*, Susan M. Gilles, *Taking First Amendment Procedure Seriously: An Analysis of Process in Libel Litigation*, 58 Ohio St. L.J. 1753, 1808 n.70 (1998) ("[T]he language in *Bose* implied that independent review might be required any time a question of First Amendment protection was at stake. Since the requirement that plaintiffs prove negligence, *falsity*, defamatory meaning, and 'of and concerning' are all constitutionally mandated, it is arguable that these too require independent review. The lower courts are divided on these issues.") (emphasis added); Thomas B. Kelley & Steven D. Zansberg, *Why Courts Should Require Plaintiffs Claiming Losses to Prove that Falsity Caused Harm*, 15 Comm. Law. 8, n.33 (Fall 1997) ("The circuits differ over whether the issue of falsity should be subject to independent review by the court, and the Supreme Court has left the question unresolved.") (citation omitted); Libel Defense Research Center, *Ten Years of Appellate Review In Defamation Cases from* Bose *to* Connaughton *to the Present*, LDRC Bulletin, 1994 Issue No. 2, at 17 (Apr. 1994) [hereinafter *Ten Years of Appellate Review*] ("30% of courts that considered the issue applied independent appellate review to the issue of falsity. . . . Most courts, however, continue to apply a clearly erroneous standard to the falsity issue, although few such courts have explicitly rejected the extension of independent appellate review to this issue. . . ."); *see also* David A. Anderson, *Is Libel Law Worth Reforming*, 140 Pa. L. Rev. 487, 497 (1991) ("Whether other issues may also be subject to independent review is open to question. The rationale [of *Bose*] . . . seems equally applicable to any other constitutional prerequisite. . . . The scope of independent review remains unclear . . . .").

III. The Question Presented Is An Important And Recurring One, And Immediate Review Is Essential In Order To Avoid The Substantial Chilling Of Protected Speech That Results From The Rule Of Law Applied Below

As the discussion above demonstrates, the question whether the truth/falsity determination is subject to independent review arises with considerable frequency in defamation cases. Numerous courts have decided that question in different ways, and other courts have implicitly rejected independent review by continuing to apply a deferential standard. *See Ten Years of Appellate Review*, *supra*, at 17 (noting that 30% of courts addressing the question have adopted independent review but that most courts "continue to apply a clearly erroneous standard").

This question, moreover, is clearly one of substantial importance. Indeed, one study of the conflicting case law in this area suggests that the standard of review is outcome-determinative in the vast majority of such cases. *Id.* at 1 ("In cases that independently reviewed the issue of falsity, appellate courts reversed the trial court judgment on that issue in 83.3% of the cases studied, compared with a reversal rate of only 8.3% in cases in which falsity was reviewed on a 'clearly erroneous' standard.").

This Court has frequently granted certiorari in order to clarify the standards of review to be applied by appellate courts. *See*, *e.g.*, *General Electric Co. v. Joiner*, 522 U.S. 136 (1997); *Koon v. United States*, 518 U.S. 81 (1996); *Salve Regina College v. Russell*, 499 U.S. 225 (1991); *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384 (1990); *Pierce v. Underwood*, 487 U.S. 552 (1988); *Pullman-Standard v. Swint*, 456 U.S. 273 (1982). As this Court recognized in *Salve Regina*, "the difference between a rule of deference and the duty to exercise independent review is 'much more than a mere matter of degree.' When *de novo* review is compelled, no form of appellate deference is acceptable." 499 U.S. at 238 (citation omitted); *see also Bose*, 466 U.S. at 501 ("The difference between the two

[standards of review] . . . is much more than a mere matter of degree."); *see also United States v. Conley*, 4 F.3d 1200, 1204 (3d Cir. 1993) ("[T]he standard of review can be outcome determinative."); *Payne v. Borg*, 982 F.2d 335, 338 (9th Cir. 1992) ("The relevant standards of review are critical to the outcome of this case.").

Immediate review of this important and recurring question is particularly appropriate here, because the alternative is to leave in place an existing rule of law that has, and will continue to have, a significant chilling effect on protected First Amendment speech. By abdicating its constitutional responsibility to "make an independent review of the whole record" in order to ensure "that the judgment below does not constitute a forbidden intrusion on the field of free expression," the court below left to the vagaries of jury verdicts the important task of determining "'the line between speech unconditionally guaranteed and speech which may legitimately be regulated.'" *New York Times*, 376 U.S. at 285. Because this line marks the boundary between immunity from liability and the potential for multimillion-dollar verdicts—as this case so aptly demonstrates—the rule applied below necessarily leads to a substantial chilling of free expression. By subjecting speakers to such a legal lottery, California's rule poses a clear threat to speech on matters of public concern—the very concern that motivated the independent-review standard in the first place. *See id.* at 278 ("[T]he pall of fear and timidity imposed upon those who would give voice to public criticism is an atmosphere in which the First Amendment freedoms cannot survive.").

Indeed, the chill on protected speech caused by the decision below is three-fold. First, absent independent judicial review, there is a substantial risk that juries will erroneously impose liability on protected speech. For precisely that reason, this Court in *Bose* held that appellate courts are obligated to undertake independent review of constitutional facts "both to be sure that the speech in question actually falls within the unprotected category and

to confine the perimeters of any unprotected category within acceptably narrow limits in an effort to ensure that protected expression will not be inhibited." 466 U.S. at 505; *see also Speiser v. Randall*, 357 U.S. 513, 526 (1958) ("The vice of the present procedure is that, where particular speech falls close to the line separating the lawful and the unlawful, the possibility of mistaken factfinding—inherent in all litigation—will create the danger that the legitimate utterance will be penalized.").

Similarly, in *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 277 (1971), the Court held that "as a matter of constitutional law" a jury could not be allowed to determine the relevance of a defamatory statement to the plaintiff's status as a public figure. A jury's resolution of that issue, the Court warned, "is unlikely to be neutral with respect to the content of speech and holds a real danger of becoming an instrument for the suppression of those 'vehement, caustic, and sometimes unpleasantly sharp attacks,' which must be protected if the guarantees of the First and Fourteenth Amendments are to prevail." *Id.* (citation omitted). The Court's warning is equally applicable to the question of substantial truth, and the risk of such erroneous judgments has a clear potential to chill substantially true (and thus protected) speech. Speakers will have no choice but to reexamine and modify their speech on matters of public concern in order to avoid the risk of substantial and unjustified damage awards if this Court does not act expeditiously to reject the legal standard adhered to below. *See New York Times,* 376 U.S. at 277 ("The fear of damage awards . . . may be markedly more inhibiting than the fear of prosecution under a criminal statute.").

Second, the sheer cost and uncertainty of protracted litigation, which California's rule encourages, threatens to chill substantially true speech. This Court has repeatedly observed that fear of the burdens and risks of litigation will inevitably spur self-censorship in the absence of vigorous judicial enforcement of First Amendment principles. *See Dombrowski v. Pfister*, 380 U.S. 479, 487 (1965) ("The

chilling effect upon the exercise of First Amendment rights may derive from the fact of the prosecution, unaffected by the prospects of its success or failure."); *Riley v. National Fed'n of the Blind of North Carolina, Inc.*, 487 U.S. 781, 794 (1988); *see also Supreme Court of Virginia v. Consumers Union*, 446 U.S. 719, 732 (1980). By eliminating independent judicial review, and thereby leaving to random juries the important task of defining the boundaries of the First Amendment's protections, the decision below encourages excessive litigation and thereby chills speech.

Third, the fact that California's rule contributes to the conflict and confusion among federal and state courts on this issue also chills protected speech. "[I]t would be intolerable to leave unanswered, under these circumstances, an important question of freedom of the press under the First Amendment." *Fort Wayne Books, Inc. v. Indiana*, 489 U.S. 46, 56 (1989) (quoting *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 247 n.6 (1974)). "[A]n uneasy and unsettled constitutional posture" for the scope of the independent-review requirement "could only further harm the operation of a free press." *Id.*

For all these reasons, this Court should grant review immediately in this case, without permitting the further harm to First Amendment interests that will necessarily ensue if California's prohibition against independent review is permitted to stand. Moreover, given the court of appeal's remand of this case for a new trial on damages, immediate review is essential to "avoid[] making vindication of freedom of expression await the outcome of protracted litigation." *Dombrowski*, 380 U.S. at 487. The Court should act now to prevent the "chilling effect upon the exercise of First Amendment rights" that will inevitably result "from the fact of the [ongoing] prosecution" of respondent's claims. *Id.*

IV. The Judgment Below Is Final For Purposes Of This Court's Review Under 28 U.S.C. § 1257(a)

The decision below finally resolves the important ques-

tion of First Amendment law presented in this petition. Accordingly, the judgment is sufficiently final to permit immediate review by this Court under 28 U.S.C. § 1257(a).

In *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975), this Court identified four categories of cases in which a judgment is sufficiently final to justify this Court's review even though further proceedings remain to be had in the state courts. The fourth such category involves "those situations where the federal issue has been finally decided in the state courts with further proceedings pending in which the party seeking review here might prevail on the merits on nonfederal grounds, thus rendering unnecessary review of the federal issue by this Court," and "reversal of the state court on the federal issue would be preclusive of any further litigation on the relevant cause of action rather than merely controlling the nature and character of, or determining the admissibility of evidence in, the state proceedings still to come." *Id.* at 482-83. In these circumstances, "if a refusal immediately to review the state-court decision might seriously erode federal policy, the Court has entertained and decided the federal issue, which itself has been finally determined by the state courts for purposes of the state litigation." *Id.* at 483.

The fourth *Cox Broadcasting* category is plainly applicable here. The First Amendment question presented in the petition has been finally decided by the court below, which squarely rejected Fireman's Fund's request for de novo appellate review of the "substantial truth" issue. App., *infra*, 14a-17a. Moreover, the judgment below upholds the liability determination on the defamation claim. *Id.* at 34a. Accordingly, all aspects of the First Amendment issue have been resolved, and there is no need for further proceedings to finalize or crystallize the lower court's disposition of the federal question.

It is equally clear that, absent immediate review, Fireman's Fund "might prevail on the merits on nonfederal grounds, thus rendering unnecessary review of the federal issue by this Court." 420 U.S. at 482. The case was re-

manded solely for a retrial on damages, and it is entirely conceivable that the results of that limited retrial could eliminate Fireman's Fund's incentive to litigate further, thereby depriving this Court of an opportunity to decide the important First Amendment issue at stake.[9]

In addition, reversal of the court below on the First Amendment issue "would be preclusive of any further litigation on the relevant cause of action." 420 U.S. at 482-83. As the dissenting justice below convincingly demonstrated—without contradiction from the majority—application of de novo appellate review inexorably leads to the conclusion that the jury's finding of falsity must be reversed. Given the undisputed facts that respondent engaged in "overbilling and other improprieties" (App., *infra*, 7, including "exaggerated unjustifiable time" entries and "substantial overstatement of . . . time," "representations of time and task . . . which were untrue," "wilfully and knowingly false" entries, "a deceptive deviation" from its contractual obligations, the receipt of "payments induced by misrepresentation," and the billing of 33 hours in a single day (*id.* at 4a, 68a-70a), the allegedly inaccurate reference to an impossible billing month was substantially true, because its "gist" or "sting"—that respondent committed gross billing improprieties and misrepresentations—was wholly accurate.

Finally, it is readily apparent that "a refusal immediately to review the state-court decision might seriously

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[9] Indeed, given the devastating nature of the concededly non-defamatory statements made in the press regarding respondent's overbilling—such as the statements that approximately $53,000 worth of time was billed by one of respondent's name partners who "did not do substantial work on the . . . litigation" and that "one senior partner at the San Francisco firm billed 33 hours in a single day," App., *infra*, 4a-6a—the jury could conclude that the 785-hour-month allegation was not itself responsible for any compensable damages.

erode federal policy." 420 U.S. at 483. "Adjudicating the proper scope of First Amendment protections has often been recognized by this Court as a 'federal policy' that merits application" of the fourth *Cox Broadcasting* category. *Fort Wayne Books*, 489 U.S. at 55. As demonstrated above, the California courts' refusal to conduct independent appellate review of issues other than "actual malice" plainly raises substantial First Amendment questions and chills constitutionally protected speech. Absent immediate review, Fireman's Fund may prevail on nonconstitutional grounds, but the pernicious effects of California's erroneous rule will remain intact. Accordingly, the judgment below is "final" for purposes of this Court's review.

CONCLUSION

The petition for a writ of certiorari should be granted. In view of the clear inconsistency between the decision below and this Court's precedents, the Court may wish to consider summary reversal.

Respectfully submitted.

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